



Ivan L. Sidney
Chairman

Todd Honyaoma, Sr.
Vice Chairman

May 15, 2006

Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
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Washington, D.C. 20240
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VIA ELECTRONIC MAIL (Hard Copy to Follow via U.S. Mail)

RE: SECTION 1813 STUDY OF TRIBAL ENERGY RIGHTS OF WAY

Dear Sir/Madam:

This letter services as additional comments from the Hopi Tribe in connection with the Section 1813 study of energy rights of way on tribal land being conducting pursuant to of the Energy Policy Act of 2005. The Hopi Tribe originally submitted written comments via Sonosky, Chambers, Sachse, & Endreson on January 20, 2006, and provided oral comments during the pre-scoping and scoping meetings held in Denver, Colorado in March and April.

- I. *Adoption of Tribal Principles.* The Hopi Tribe wishes to submit as part of its comments the Tribal Principles that follow:

**INDIAN TRIBES - PARTNERS IN AMERICA'S ENERGY FUTURE
SECTION 1813 RIGHT-OF-WAY STUDY - TRIBAL PRINCIPLES**

1. **Tribal Sovereignty and Consent.** The power of tribes to prevent third parties from using tribal lands without tribal consent is a critical element of tribal sovereignty that has been established in federal law and policy for over 200 years. The tribal consent requirement to the use of tribal lands should be honored and preserved.
2. **Conditions to Consent.** The tribal consent requirement includes the power of tribes to place conditions on the use of tribal lands, including conditions related

to tribal jurisdiction, preservation of environmental and cultural resources, duration of use, and compensation.

3. **No Negative Effects.** Adherence to the tribal consent requirement has resulted in greater energy production in Indian country and lower energy costs to consumers. The tribal consent requirement for rights-of-way has not had a noticeable negative effect on the availability or cost of energy to consumers.
4. **Preservation of Tribal Jurisdiction.** No right-of-way agreement or other business arrangement that permits third-party use of tribal land should reduce the sovereign power of a tribe over its lands or the activities conducted on its lands in the absence of the specific consent of the tribe.
5. **Restricted Duration of Rights-of-Way.** Federal law and policy should not be changed to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.
6. **Negotiated Compensation.** Tribes should continue to have the right to negotiate compensation for the use of tribal land that gives tribes a fair share of the economic benefits produced by use of their lands. Such revenues sustain tribal governments and cultures.
7. **National Security.** Indian nations are an integral component of energy security of the United States, not a threat to that security. History demonstrates that tribes have permitted critical energy facilities to be used pending compensation negotiations even in cases where tribal rights-of-way have expired.
8. **Industry Partnerships – Best Practices.** Federal law and policy should provide positive incentives to tribes and industry to foster partnerships and the mutual alignment of economic interests related to energy development, transmission, and distribution.
9. **Appropriate Deference.** As reflected in the Indian Tribal Energy Development and Self Determination Act of 2005, deference to tribal decision-making is and should remain a fundamental component of Federal Indian energy policy.
10. **Allottee Experience.** The creation of a Federal administrative valuation process for fixing tribal right-of-way compensation would be an affront to tribal sovereignty and, as shown by the disastrous Federal management of Indian allottee resources, would be a mistake.

As you are aware, these principles were developed by a number of Tribes working together with an eye toward providing some basic statements of position regarding the Study's process and progress as well as any potential recommendations made as a result of the Study. The trust responsibilities of both the Departments of the Interior and Energy must be used by the Departments as guidance in the processing of comments and information as well as the drafting of the Study report, and these principles are a clear expression of the Hopi Tribe's position as what is in its best

interests and what recommendations should be made by the Departments in the Study, if any.

- II. *Need for Context.* The Hopi Tribe has previously stated its disagreement with the Departments' decision to move forward with the study based on the "case study" method, and instead recommended a complete survey. The basis for this recommendation is the need to accurately present the true picture of the historical and current circumstances surrounding energy easements across tribal lands rather than "snapshot" views of particular events chosen to highlight extremes.

It is essential that the Study present the totality of the circumstances that are relevant to an energy right of way. By way of example, according to the Department of Energy's own documents, the Hopi Reservation has the second lowest percentage of households with access to electricity in the United States (only slightly higher than Navajo) with 29% of its residents living without electricity as opposed to the national average of approximately 1%.¹ See, Dep't of Energy, Energy Consumption and Renewable Energy Development Potential on Indian Lands, available at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html> (April 2000). The major provider of electrical services in Arizona has an agreement for a right of way across the Hopi Reservation for a 500 kV transmission line that is more than 25 years old. The original 25 year term of that agreement paid the Tribe a total of \$755.00 for an approximate 50 mile right of way. Though there is some debate between the Tribe and the electrical provider whether the original agreement was automatically renewable at the same compensation at the end of the first 25 years, the electricity has continued to flow uninterrupted. This line does not provide any electricity to Hopi residents. At the same time, it is standard practice for the Hopi Tribe to waive any compensation from the electric provider for rights of way for electrical service lines – those electrical lines providing service *on* the Reservation. Those lines sometimes have to be extended and based on the electric provider's policies the costs of those extensions can be charged to the user (which the Tribe will pay in certain circumstances) at a per foot basis. So, at the same time that the Tribe has been paid a total of \$1510.00 for a 50 year 50 mile right of way that supplies electrical power to millions while supplying none to Hopi, it foregoes fees in order to supply power to its residents' homes and sometimes pays for the necessary extension for those lines.

It is not just the use of the case study approach generally that raises concerns about context. Each part of the Study's required areas also require consideration of context. For instance, the historical compensation part of the Study requirement requires consideration of the context of the particular tribal right of way as well as the context of the timing of the grant or renewal. For decades tribes in the United States have been subject to policies enacted without their input or consent that systematically stripped them of their land, their rights, and their resources. Were the historical rights of way being looked at in the case studies original granted with actual tribal consent, *i.e.*, during a time in the history of Indian policy when such consent was required, or at a time when the Secretary of the Interior or other government official merely signed on behalf of the tribe? Or signed on behalf of an

¹ According to the same data 19% of Hopi households also have no access to natural gas. Both of these numbers are many times the national average for such lack of access.

allottee? Were any rights of way being studied signed or authorized while a tribe was considered “terminated” pursuant to the policies of the termination of the 1950’s?

All of the relevant issues that present a full and fair picture of events and their circumstances must be understood before the Study can purport to make conclusions and/or recommendations.

The enormity of this requirement is telling. Indian tribes across the country vary greatly as to their history and experiences – with each tribe or reservation facing unique circumstances. It is inappropriate to generalize, therefore, from one tribe’s experience to all tribal rights of way across all of Indian country.

III. Tribes as Partners in Industry, Governmental Entities, Business Owners & Consumers.

Section 1813 requires that the Secretaries of the Interior and Energy, “shall consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers.” It is important for the Departments to keep in mind for the Study that Indian tribes belong to all of the groups that are required to be consulted with. It became clear over the course of the public meetings in Denver, that it is the perception that tribes interests are contrary and separate to the energy industry representatives that drove much of the comments offered by those proclaiming the need for change in the granting and renewal of tribal energy rights of way. It was also presented quite clearly that this perception is inaccurate. Tribes are part of the energy industry – they are business owners, consumers, energy producers, and energy transporters. It is when tribes are viewed as and are therefore able to act as partners with other energy industry representatives that the most advantageous relationships emerge – for the tribes, for the energy industry generally, and therefore for the United States’ energy interests. Rather than following along with a limited view of tribes, their relationships, and their interests, the Study should make clear the multiple roles of tribes in today’s economy, and how the tribe’s freedom to shape their role (reliant in great part on their right as any other land owner to leverage the use of their lands) can dictate success or failure.

IV. No evidence of Detrimental Effect of Tribal Consent on Either Consumer Costs or Energy Delivery. Repeatedly throughout the pre-scoping and scoping meetings in Denver, it was certain of the energy industry representatives set forth the conclusion that the increasing costs of tribal rights of way hurts national energy interests, both as to the security of the nation’s energy and in the terms of costs to consumer. This conclusion was used as the basis for the insistence that change needs to be made in the form of either eminent domain of tribal lands or some species thereof with “set formula” for compensation for tribal rights of way. Nothing in the way of clear and concrete evidence or facts were presented to support the initial conclusion made by these representatives, and instead were ‘supported’ only by vague references to problems with some tribes on some issues. The result is circular reasoning that provides little to help understand what the exact nature of any problems is, much less what the potential responses may be. It is imperative that any study rely on facts, not just blind assertions. It is just as imperative that before the Study can make any recommendations that would potential change so many tribes’ (as well as their

business partners') rights and interests that any alleged problems be unequivocally proven by those facts.

- V. *The Role of the Department of the Interior.* Most of the information being requested for the Study from the Departments regarding the historical rates of compensation for tribal energy rights of way is information that should be kept by and available from the Department of the Interior. In fact, it is part of their statutory duty to keep such records. The lack of availability of that information from the Department of Interior and/or what the state or the Department's records of this information are must be part of the Study. Considering the comments of those at the Denver meetings, it is clear to see that the position of some participants is to recommend that the Study conclude that the Department of Interior should have some increased role (either in granting consent outright or in developing or overseeing rates of compensation) in the process of approval of tribal energy rights of way. It stands to reason, therefore, that the Study should include a fair assessment of the Department's ability to carry out the responsibilities currently assigned it regarding rights of way in Indian Country before it makes any recommendation that could end up with it gaining more responsibility over tribes' interests.

The Hopi Tribe is opposed to any Study conclusion or proposal that would change a Tribe's authority under existing law to consent to rights of way across the Tribe's lands. Such matters should be left to arms length transactions between the Tribes and those who seek the Tribe's leave to come onto their lands and use them. The United States history regarding tribal rights and resources is replete with stories of tribes losing what little they have left to make way for "progress." One of the few precious resources tribes have left is their land and the ability to control its use. Rather than contemplate taking more away from tribes because of the rare but inevitable problems that occur, tribes' ability to control their lands and therefore their future should be encouraged and facilitated.

Sincerely,

s/Cliff Qotsaquahu
Cliff Qotsaquahu
Hopi Tribal Energy Team

XC: Chairman Sidney
Hopi Tribal Council
Scott Canty